E COPY

Office Supreme Court, U.S.
FILED
NOV 21 1958
JAMES R. BROWNING, Clerk

No. 449

In the Supreme Court of the United States

OCTOBER TERM, 1958

J. B. BEAN AND 63 OTHERS, PETITIONERS

v.

UNITED STATES OF AMERICA

On Petition for a Writ of Certiorari to the United States Court of Claims

BRIEF FOR THE UNITED STATES IN OPPOSITION

J. LEE RANKIN,
Solicitor General,

PERRY W. MORTON,
Assistant Attorney General,

DAVID R. WARNER,
S. BILLINGSLEY HILL,
ALFRED H. O. BOUDREAU, JR.,
Attorneys,
Department of Justice,
Washington 25, D. C.

INDEX

	Page
Opinion below	1
Jurisdiction	1
Question presented	2
Statute involved	2
Statement	3
Argument	7
Conclusion	13

CITATIONS

Cases:

Hudspeth County Conservation & Reclamation District No. 1 v. *Robbins*, 213 F.2d 425, certiorari denied, 348 U.S. 833	6, 9
Ickes v. *Fox*, 300 U.S. 82	11
Ivanhoe Irrigation District v. *McCracken*, 357 U.S. 275	8
Miller, et al. v. *Jennings, et al.*, 243 F.2d 157, certiorari denied, 355 U.S. 827, rehearing denied 355 U.S. 885	6
Nebraska v. *Wyoming*, 325 U.S. 589	12
New Mexico, State of v. *Backer*, 199 F.2d 426	5
United States v. *Gerlach Live Stock Co.*, 339 U.S. 725	11

Convention and Statutes:

Act of February 25, 1905, 33 Stat. 814	3
Convention of May 21, 1906, between the United States and Mexico, 34 Stat. 2953	3
Reclamation Act of June 17, 1902, 32 Stat. 388, 43 U.S.C. 372	
Section 4	3
Section 8	8
Warren Act of February 21, 1911, c. 141, Sections 1 36 Stat. 925, 43 U.S.C. 523	2, 4, 6, 9, 10
Chapter 102, Section 22, 36th Legislative Assembly, Territory of New Mexico	3
General Laws of Texas, Regular Session, 29th Legislature, Chapter 101	3

Miscellaneous:

46 Cong. Rec. 2781	10
46 Cong. Rec. 2782	9, 10

In the Supreme Court of the United States

OCTOBER TERM, 1958

No. 440

J. B. BEAN AND 63 OTHERS, PETITIONERS

v.

UNITED STATES OF AMERICA

On Petition for a Writ of Certiorari to the United States Court of Claims

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Claims (Pet. App. 27) is reported at 163 F.Supp. 838.

JURISDICTION

The judgment of the Court of Claims was entered on July 16, 1958. The petition for a writ of certiorari was filed on October 13, 1958. The jurisdiction of this Court is invoked under 28 U.S.C. 1255 (1).

QUESTION PRESENTED

Whether landowners, who have had the use of water pursuant to a contract under the Warren Act, 43 U.S.C. 523, authorizing the furnishing of water for non-project use subject to first rights of the project landowners, have a claim against the United States for a taking when the non-project use is interrupted by reason of the need for the water for lands within the project itself.

STATUTE INVOLVED

In pertinent part, Section 1 of the Act of February 21, 1911 (the Warren Act), 36 Stat. 925, 43 U.S.C. 523, provides:

> Whenever in carrying out the provisions of the reclamation law, storage or carrying capacity has been or may be provided in excess of the requirements of the lands to be irrigated under any project, the Secretary of the Interior, preserving a first right to lands and entrymen under the project, is hereby authorized, upon such terms as he may determine to be just and equitable, to contract for the impounding, storage, and carriage of water to an extent not exceeding such excess capacity with irrigation systems operating under the Act of August eighteenth, eighteen hundred and ninety-four, known as the Carey Act, and individuals, corporations, associations, and irrigation districts organized for or engaged in furnishing or in distributing water for irrigation. * * *

STATEMENT

This case concerns the water of the Rio Grande River, an interstate and international waterway. By the Convention of May 21, 1906, between the United States and Mexico, 34 Stat. 2953, the United States is obligated to furnish to Mexico 60,000 acre-feet of water annually from the river, with proportionate diminution in case of accident or extreme drought. To serve this purpose and to provide irrigation water for lands in New Mexico and Texas, the United States developed the Rio Grande reclamation project, the primary facilities being the Elephant Butte and Caballo Dams and Reservoirs in New Mexico.[1]

In furtherance of the project, the United States, in 1906 and 1908, appropriated all the unappropriated waters of the Rio Grande (Pet. App. 29-30) and in 1916 completed the Elephant Butte Dam. The project itself comprises two irrigation districts, the Elephant Butte Irrigation District in New Mexico and the El Paso County Water Improvement District No. 1 in Texas. These districts have been repaying construction costs of the project as required both by Section 4 of the Reclamation Act of June 17, 1902, 32 Stat.

---

[1] The project was initially authorized by the Act of February 25, 1905, 33 Stat. 814, which extended the Reclamation Act of June 17, 1902, 32 Stat. 388, to Texas and empowered the Secretary, if in his judgment a feasible project could be developed, to construct a dam on the Rio Grande "as part of the general system of irrigation." In the same year, the State of Texas and the Territory of New Mexico indicated their approval. General Laws of Texas, Regular Session, 29th Legislature, Chapter 101, p. 151; Chapter 102, Section 22, 36th Legislative Assembly, Territory of New Mexico.

388, and by contracts between the United States and each district.[2]

Petitioners are landowners in the Hudspeth County Conservation and Reclamation District No. 1, an irrigation district which is located in Texas south of El Paso County and which is indisputably not within the project. Under the Warren Act, *supra*, p. 2, the Hudspeth District entered into a contract originally dated December 1, 1924, and amended April 27, 1951, with the United States for the use of excess water of the Rio Grande project (Pet. App. 34-36). The Warren Act authorizes the Secretary, when storage or carrying capacity exceeds the requirements of project lands, to contract with others outside the project, for the storage and carriage of water, "*preserving a first right to lands and entrymen under the project*" (emphasis added). Paragraph 2 of the 1924 contract contained the recital that Hudspeth is "located in Texas, just below the Rio Grande Federal Irrigation Project" (Pet. App. 37). Paragraph 6 contained these provisions:—the United States agreed to deliver "such water from the project as may be available at said terminus without the use of storage from Elephant Butte reservoir. The Secretary of the Interior shall be at all times the sole judge of the availability of such water. The rental of water hereunder is secondary and inferior to the right to use water for any purpose on the lands of the Rio Grande Federal irri-

[2] These contracts appear at pages 86-105 of the appendix to Defendants' Motion for Summary Judgment and Brief in Support Thereof which was filed as part of the record in this Court.

gation project. In consideration of such rental the District [i.e. Hudspeth] hereby relinquishes all right, title, interest, and claim to any and all waters of the Rio Grande, except as herein provided" (Pet. App. 34-35). Similar provisions were contained in the 1951 amendatory contract which additionally made the Secretary of the Interior the arbiter of all disputes (Pet. App. 35-36).[3]

In early 1951, due to prolonged drought in the Rio Grande watershed and the increased recapture and re-use of waters by the owners of project lands, little or no water reached Hudspeth.[4] As contemplated by the 1951 contract, this conflict between Hudspeth and owners of project lands was, in March 1951, presented to the Secretary of the Interior by Hudspeth officials (pp. 198-201, Motion for Summary Judgment). In April 1951, the Secretary stated that the owners of project lands had a legal right to re-use return flow water and concluded: "Although I am in sympathy with your position, I must recognize the

[3] In the intervening period, amendatory contracts were executed which related principally to the annual water rentals. The full text of the 1924 and 1951 contracts is set out at pages 110-115 and 121-129 of Defendants' Motion for Summary Judgment and Brief in Support Thereof which was filed as part of the record in this Court.

[4] The seriousness of the drought condition at that time was reflected at the other end of the Rio Grande Project when the level of water in Elephant Butte Reservoir had fallen to such a degree that the State of New Mexico sued reclamation officials to restrain them from further releasing the water on grounds that a health menace would result. That action was dismissed as being a suit against the United States. *State of New Mexico* v. *Backer*, 199 F.2d 426 (C.A. 10).

existence of primary rights in the El Paso District to the extent available project waters are required for beneficial use on that District's land" (pp. 202-203, Motion for Summary Judgment).

Thereafter, Hudspeth and five individual landowners, as representatives of all landowners in the Hudspeth District, instituted suit against Bureau of Reclamation officials, several landowners in the El Paso District and the El Paso District itself (Pet. 4). They sought a declaratory judgment to establish their claimed water rights and an injunction against the federal officials from interfering with them. The district court granted the defendant's motion for summary judgment on the merits and dismissed the action. The court of appeals construed the Reclamation Act of 1902 and the Warren Act and ruled that the action was in fact a suit against the United States. Accordingly, it ordered dismissal for lack of jurisdiction. *Hudspeth County Conservation & Reclamation District No. 1* v. *Robbins*, 213 F.2d 425 (C.A. 5), certiorari denied, 348 U.S. 833.

Following another unsuccessful effort by the Hudspeth District and others to obtain injunctive relief (*Miller, et al.* v. *Jennings, et al.*, 243 F.2d 157 (C.A. 5), certiorari denied, 355 U.S. 827, rehearing denied 355 U.S. 885), petitioners instituted this action in the Court of Claims against the United States to recover compensation under the Fifth Amendment for the taking of their alleged water rights (Pet. 5). Motion by the United States for summary judgment on the merits was granted by the court below and the petition was dismissed (Pet. App. 44). The court held

(Pet. App. 27-44) that petitioners acquired no rights under the notices of appropriation filed by the United States in 1906 and 1908 because they were for water to be used on lands in the project and petitioners' lands are outside the project. Accordingly, it ruled that petitioners' rights derive solely from the Warren Act contract with the Hudspeth District and, by its terms, their rights are inferior to the need on the project caused by "the severe drought in Texas" (Pet. App. 36).

ARGUMENT

In essence the petitioners base their claim on the beneficial use of water provided for their lands under a contract which is conditional in nature. It cannot be asserted that the condition was not authorized by the Warren Act. The petitioners merely claim that beneficial use under Texas water law and Section 8 of the Reclamation Act of 1902 gives them a right to continue to receive water regardless of the condition. Their contentions have been unanimously rejected by the three courts to which they have been presented. Thus, the Court of Claims in this case and both the United States District Court for the Western District of Texas and the Court of Appeals for the Fifth Circuit in *Hudspeth County Conservation & Reclamation District No. 1* v. *Robbins*, 213 F.2d 425, 431, certiorari denied, 348 U.S. 833, have held that petitioners' rights to receive water outside the project derive exclusively from the Warren Act contract and the contract, as required by the Act, subjects petitioners to first rights in landowners within the project. There are no conflicting decisions. Petitioners' reference

(Pet. 21) to the large acreage irrigated under Warren Act contracts does not make the unsound argument on which they rely an important question warranting review by this Court.

Petitioners set forth at length the doctrine of prior appropriation in the western states and advert to Section 8 of the Reclamation Act of 1902, 32 Stat. 388, 390, 43 U.S.C. 372, 383 (Pet. App. 23), as preserving state law relative to control, appropriation, and distribution of water used in federal irrigation projects.[*] From that they reason that once they have beneficially used water received under their Warren Act contract they have established a vested right to it under state law. This attempt to graft state appropriative water rights to a conditional contract under the Warren Act must fail both because the state law is inapplicable to such contract rights and because, if applicable, it could not enlarge them.

Thus, notwithstanding their insistence upon the applicability of state law, petitioners' rights were subordinate to those of the project for which the water had earlier been appropriated. Indeed, the Hudspeth District, by its contract, expressly relinquished any

---

[*] In the words of this Court: "As we read Section 8, it merely requires the United States to comply with state law when, in the construction and operation of a reclamation project, it becomes necessary for it to acquire water rights or vested interests therein. But the acquisition of water rights must not be confused with the operation of federal projects. * * * We read nothing in Section 8 that compels the United States to deliver water on conditions imposed by the State." *Ivanhoe Irrigation District* v. *McCracken*, 357 U.S. 275, 291-292.

claims which its landowners might previously have had in any waters of the Rio Grande (Pet. App. 34, 35-36). The only rights they had to the waters received were bottomed on the Warren Act contract with the Hudspeth District. Petitioners plainly concede in the very statement of the question presented that all the waters involved were " * * * waters delivered under Warren Act contracts * * * " (Pet. 3). Thus, the petitioners have no claim under state law to the right they assert in the waters delivered.

The Rio Grande project has never included petitioners' lands. This was found to be the fact by the court below in the present case (Pet. App. 31-40) and also by the Fifth Circuit in *Hudspeth County Conservation & Reclamation District No. 1* v. *Robbins*, 213 F.2d 425, 431, certiorari denied, 348 U.S. 833, on grounds which cannot reasonably be disputed. Petitioners' assertion (Pet. 4, 20) that they have received water "by operation of the very irrigation works" referred to in the federal notices of appropriation does not serve to place their lands within the project or to make the federal appropriation for their benefit any more than it would do so to any landowner who happened occasionally to receive a run-off from the federal project. Of course, the very signing of a Warren Act contract acknowledges that the water is to be delivered to non-project lands.

The Warren Act, as the Court of Claims correctly held (Pet. App. 33), authorized contracts "to deliver to nonproject lands only such water as is in excess of the needs from time to time of the project lands." See 46 Cong. Rec. 2782. The Act provides that such

contracts could be made only upon "preserving a first right to lands and entrymen under the project." That means "a first right" to the water appropriated for the project as well as a first right to the carrying capacity of the irrigation works for such appropriated, project water. It can mean nothing else in order to preserve the project rather than to promote peripheral developments at the expense of the project.[6]

The contracts under the Warren Act, pursuant to which water was delivered for use on petitioners' lands, follow the requirements of the Warren Act. Thus, Section 6 of the 1924 and 1951 contracts (Pet. App. 34, 35) provides that only "such water from the project as may be available" will be delivered, that "availability will be dependent upon operating conditions on the project," that the "Secretary of the Interior shall be at all times the sole judge of the availability of such water," and that the "rental of water hereunder is secondary and inferior

---

[6] Reliance by the petitioners (Pet. 17-19) on the legislative history of the Warren Act is misplaced. An examination of the entire debate does not support the conclusion which the petitioners would draw from excerpting some of Congressman Reeder's remarks. Whatever doubt might arise from his statement at 46 Cong. Rec. 2781 is eliminated by the clarification presented by Congressman Mondell, Chairman of the House Public Lands Committee, at page 2782:

> "* * * so that the first rights are those under the project, and nothing can be done, nothing is contemplated in this bill, nothing that we could do could take from the project the water necessary for the irrigation of all of the lands under the project."

to the right to use of waters on the Rio Grande Federal Irrigation Project for any purposes." Section 13 (Pet. App. 34, 36) recognizes that due to "drought" or "by reason of the requirements and use on the lands within the Rio Grande Federal Irrigation Project * * * there may be at times an insufficiency of water for District lands * * *." In fact at this very point of the contract it is recognized in express terms that the United States has no liability. Those contractual provisions control this case. They are the sole source and measure of petitioner's rights. As the court below found (Pet. App. 36), " * * * it is not disputed that during the severe drought in Texas this water was needed on project lands. When the drought was broken we understand deliveries of water to District lands were resumed." Petitioners' district plainly agreed to such a procedure. There is nothing in the contract or in the authorizing statute to give them the perpetual right to uninterrupted delivery which they claim. The petition ignores completely these contract provisions. Elimination of contract provisions precisely covering the situation which occurred is essential for petitioners to present an argument at all. There can be no justification for such negation of the contract.

The decisions cited by petitioners relative to the general law of water rights in western states need not be disputed. Their other authorities are not apposite. Thus, *United States* v. *Gerlach Live Stock Co.*, 339 U.S. 725 (Pet. 5), dealt with a water right having valid existence under state law prior to the reclamation project. The only language in *Ickes* v. *Fox*,

300 U.S. 82, and *Nebraska* v. *Wyoming*, 325 U.S. 589 (Pet. 11-14), relative to vesting of title to water rights, dealt with lands within the reclamation project for which the Government had expressly appropriated the water.

Contrary to petitioners' contention (Pet. 16-17), the decision below does not violate any general doctrine that a water right must be appurtenant to the land irrigated. The Warren Act and the contract under it in this case by "preserving a first right to lands and entrymen under the project" have made certain, in accordance with the language of petitioners' cited authority (Pet. 9), that the appropriated water shall not be "disassociated from the land to which it is designed to be applied." The real question is not whether petitioners' rights, whatever they may be, are appurtenant to their lands. The question is whether those rights are junior and inferior to the first right to use available project waters on project lands.

CONCLUSION

The decision by the Court of Claims is correct and does not call for review by this Court. There is no conflict. The petition for a writ of certiorari should be denied.

Respectfully submitted,

J. LEE RANKIN,
Solicitor General.

PERRY W. MORTON,
Assistant Attorney General.

DAVID R. WARNER,
S. BILLINGSLEY HILL,
ALFRED H. O. BOUDREAU, JR.,
Attorneys.

NOVEMBER 1958

☆ U. S. GOVERNMENT PRINTING OFFICE 1958 488389 674